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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 469

ANNE FEINBERG,

Petitioner,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING CERTIORARI.

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SUBJECT INDEX.

PAGE

Statement of the Case 1

Summary of Argument 5

Argument 6

Conclusion 15

CITATIONS.

Cases.

Adams Express Co. v. Croninger, 226 U. S. 491, 504, 505, 508, 509 ..... 9, 11, 13

American Railway Express Co. v. Daniel, 269 U. S. 40 ..... 4, 6, 9, 10, 12, 14

American Ry. Express Co. v. Levee, 263 U. S. 19 9

American Railway Express Co. v. Lindenburg, 260 U. S. 584, 585, 587, 588, 589, 591, 592 ..... 6, 8, 9, 11, 12

Caten v. Salt City Movers and Storage Co., Inc., 149 Fed. 2d 428 ..... 4, 5, 8

C. N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319 9

C. & N. W. R. Co. v. Whitnack Co., 258 U. S. 369 9

C. & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597 9

Davis v. Cornwell, 264 U. S. 560 9

Galveston Wharf Co. v. Ry. Co., 285 U. S. 127 9

Ga., Fla. & Ala. R. Co. v. Blish Milling Co., 241 U. S. 190 9

Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 514 12

Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 652 ..... 10, 11, 12
M. K. & T. R. Co. v. Harriman, 227 U. S. 657 9
N. Y. C. & H. R. R. R. Co. v. Beaham, 242 U. S. 148 ... 9
Peyton v. Railway Express Agency, 316 U. S. 350 ... 9
Pierce v. Wells Fargo & Co., 236 U. S. 278 ..... 9, 14
Plaff v. Pacific Express Co., 159 Ill. App. 493, 498 4
Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I. C. C. 423 9
Southeastern Exp. Co. v. Pastime Amusement Co., 299 U. S. 28 9
Southern Express Co. v. Byers, 240 U. S. 612 9
Southern Ry. Co. v. Prescott, 240 U. S. 632 at 639 9

Statutes.

Interstate Commerce Act—Title 49 U. S. C.:
Section 6(1) 10
Section 6(7) 10
Section 10(1) 10
Section 10(2) 10
Section 10(3) 10
Section 16(13) 6
Section 20(11) 4, 9, 10

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OPPOSING BRIEF.

STATEMENT OF THE CASE.

Respondent opposes the petition for writ of certiorari because (1) the reasons relied on by petitioner as set forth on pages 4 and 5 of her petition are not supported by the facts and the law in the case, and (2) the decision of the Circuit Court of Appeals is sound.

The controversy is whether respondent's liability is the full value, $4,880.00, of petitioner's fur coat lost while in custody of respondent as an interstate carrier, or $50.00, the value declared in respondent's Uniform Express Receipt issued to the individual who delivered the fur coat packed in a carton to respondent for transportation.

Petitioner's summary statement of the matter (1) is incomplete in that it omits important tariff rules and the fact that neither petitioner nor her husband raised any objection to the valuation of $50.00 in the receipt until they were notified of the loss March 22, 1946, fifteen days after her husband received the receipt (R. 24, 25), and (2) inaccurately states that it was the custom for the hotel porter to fill out express receipts for hotel guests (petition p. 2) whereas the custom was that either the hotel porter or the employe who delivered the shipment to the Express office filled out the express receipts for hotel guests (R. 40). Therefore respondent sets forth the facts complete as to their importance to the propriety of certiorari.

On March 5, 1946, while a guest at the Arizona Biltmore Hotel, Phoenix, Arizona, petitioner's husband delivered her fur coat, enclosed in a carton and addressed to her furrier in Chicago, to a bellboy at the hotel with instructions to deliver it to respondent for transportation (R. 21, 22). He said nothing to the bellboy concerning the value or contents of the package, the payment of transportation charges, or any limitation of liability (R. 23).

On the same day Arthur Heinecke, a regular employe of the hotel for such purposes since 1929, transported the package with others to the office of respondent at Phoenix, Arizona (R. 37, 39, 40). Heinecke tendered the package to respondent's representative Cole, who asked him to state the contents and the value. Heinecke told Cole that he did not know anything about the contents and value and that Cole should "put on the minimum value which you allow, $50.00" (R. 39). On receipt of the package from Heinecke, respondent, through its agent Cole, filled out and delivered to Heinecke its Uniform Express Receipt showing a declared value of $50.00 [R. 38; defend-

ant's Exs. 1 and 2, R. 29, 30 and 45]. Heinecke testified, "If time permitted, the porter or myself usually filled out the receipts" and "I always got a receipt for every package I delivered to the Express Office. Sometimes these receipts were filled out by the Express office employee" (R. 41).

Petitioner's husband found the receipt in his mail box at the office of the hotel on March 7, 1946 (R. 24). He heard nothing further concerning the fur coat until March 22, 1946 when the agent of the Express Agency at Phoenix telephoned him and reported that the shipment had been stolen en route at El Paso, Texas, March 6, 1946 (R. 25, 26). When petitioner's husband received the Express Receipt from his mail box March 7, 1946 he placed it in his wallet and neither he nor petitioner read it until March 22, 1946 when they were advised of the loss (R. 24, 25, 44).

Respondent offered no evidence except its Uniform Express Receipt No. 6679 covering the shipment (defendant's Ex. 1, R. 45, offered in evidence R. 27, 29), a photostatic copy of said receipt and its tariffs.

The Terms and Conditions of the Uniform Express Receipt, physically a part of the receipt, are incorporated in and made a part of respondent's tariffs (defendant's Ex. 3, R. 30, I. C. C. No. 4500, p. 34). The Terms and Conditions of the Uniform Express Receipt and the tariffs are omitted from the printed record, but in accordance with stipulation of the parties may be referred to as though they were included therein (R. 66, 67).

Clause 2 of the Terms and Conditions of the Uniform Express Receipt and tariff Rules 2 and 13, important to the solution of the controversy, are set forth under Point I of this brief.

The crucial issue of the case is whether the value of

$50.00 set forth in the Express Receipt, issued at the time the hotel employe delivered the shipment to the Express Agency, constituted "the value declared in writing by the shipper or agreed upon in writing as the released value of the property" under Section 20(11) Title 49 U. S. C.

The respondent contends that the general federal law applies and on the basis thereof its liability is limited to $50.00. *American Railway Express Co.* v. *Daniel* 269 U. S. 40.

Petitioner contends that the local law, presumably the law of Illinois, applies, citing *Plaff* v. *Pacific Express Co.*, 159 Ill. App. 493, 498, and then inconsistently urges "The uniform law is that a truck driver, not in the shipper's employ, has no implied authority to bind the shipper to a limitation * * *" (petitioner's brief pp. 10, 11), citing state cases and one Federal District Court case which respondent urges are not in point because they concern intrastate shipments, or shipments made prior to 1906, the effective date of the Carmack Amendment, or other circumstances which distinguish them from the instant case.

Petitioner also urges, assuming no value was declared or agreed upon in writing, that respondent's tariff rules relied upon by the Circuit Court of Appeals were void. In support of this contention she cites *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428 (Circuit Court of Appeals Second Circuit) and urges, as one of her grounds for certiorari, that the decision in that case is in direct conflict with the decision of the Seventh Circuit in the instant case. That there is no conflict is made clear in Point II of this brief.

SUMMARY OF ARGUMENT.

I.

The tariff rules are valid and in harmony with the statute.

II.

Caten v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428, is not in conflict with the decision of the Circuit Court of Appeals Seventh Circuit in the instant case.

III.

The limitation is binding upon petitioner.

IV.

Petitioner is estopped from recovering a greater sum than $50.00.

ARGUMENT.

I.

The Tariff Rules Are Valid and in Harmony With the Statute.

Respondent's tariffs were accepted in evidence without objection (defendant's Ex. 3, R. 30). The tariffs were certified by the Interstate Commerce Commission and any objection to the admission thereof in evidence would have been unavailing. Section 16(13) Title 49 U. S. C.; *American Railway Express Co.* v. *Daniel*, 269 U. S. 40; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584 at 589. The Terms and Conditions of the Uniform Express Receipt, physically a part of the receipt and also a part of the tariffs, and the tariffs because of their bulk were not included in the printed record but, pursuant to stipulation (R. 66, 67) may be referred to as though printed.

Clause 2 of the Terms and Conditions of the Uniform Express Receipt provides:

> "In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared

and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value."

Tariff Rule 2 provides:

"A receipt of the form prescribed herein must be given for all matter received. The value of the property must be declared by the shipper, and inserted in the receipt. The shipper's declaration of such value may be made by inserting 'not exceeding $50.00,' or 'not exceeding 50 cents per pound, actual weight,' as the case may be, in the blank space in that portion of the receipt reading 'value herein declared by shipper to be ..... Dollars.'

"When the value so declared exceeds $50.00 as to shipments weighing 100 pounds or less, or exceeds 50 cents per pound as to shipments weighing over 100 pounds, the value must be marked by the shipper upon the shipment."

Tariff Rule 13 provides:

"(a) Rates named in tariffs governed by this Classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, and, except as to articles provided for in Rule 13(b) and except as to live animals, live stock and other live creatures provided for in Rule 13(c), are based upon property declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, the charges are 10 cents greater for each $100 or fraction thereof in excess of the value stated above."

[13(b) concerns carvings, ceramics, pastels, pictures, sculpture, statuary, etc. It does not concern fur coats.]

These tariffs on their face offer a choice of rates depend-

ent upon value which, by reason of Clause 2 of the receipt and tariff Rule 2, must be declared or agreed upon in writing. The case of *Caten* v. *Salt City Movers and Storage Co., Inc.*, 149 Fed. 2d 428, relied upon heavily by petitioner, is not in point. In that case the validity of the contract, if any, limiting liability, was held invalid. The validity of the tariffs was not questioned.

It is clear that under Section 20(11) Title 49 U. S. C., set forth in the Appendix of the petition, the tariffs complained of by petitioner are valid. *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584 at 587, 588, 589.

II.

Caten v. Salt City Movers and Storage Co., Inc., 149 Fed. 2d 428, Is Not in Conflict With the Decision of the Circuit Court of Appeals, Seventh Circuit, in the Instant Case.

In the *Caten* case there was no question of agency. As the court in that case said at page 432 of 149 Fed. 2d:

> "All that took place respecting valuation occurred in the two telephone conversations, one after the shipment was weighed in Syracuse before the van left and the other after it had been destroyed by fire, the latter being too late, of course, to count as a valuation upon which the rate was based."

No bill of lading or shipping receipt ever was given petitioner or any agent representing petitioner. The opinion does not show what the terms of the carrier's receipt or bill of lading were. In the *Caten* case no value was declared or agreed upon in writing.

In the instant case the value of $50.00 was placed in the receipt pursuant to the instructions of petitioner's agent who delivered the shipment to the carrier, and the receipt was delivered to petitioner's agent and accepted by her husband without complaint until after knowledge of the loss. The material difference between the two cases is plain.

III.

The Limitation Is Binding Upon Petitioner.

Respondent is a common carrier subject to Part 1 of the Interstate Commerce Act. *Securities and Acquisition of Control of Railway Express Agency, Incorporated,* 150 I. C. C. 423. By the enactment of the Carmack Amendment to the Interstate Commerce Act (Section 20 (11) Title 49 U. S. C.) Congress in 1906 embraced the issue of liability on interstate shipments by express within the fold of the federal law requiring uniformity and a construction of interstate transportation contracts consistent with the purpose of the Interstate Commerce Act to do away with all forms of unjust discrimination. *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 504, 505; *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632 at 639. See also:

M. K. & T. R. Co. v. *Harriman,* 227 U. S. 657.

Pierce v. *Wells Fargo & Co.,* 236 U. S. 278.

C. & W. C. R. Co. v. *Varnville Furniture Co.,* 237 U. S. 597.

Southern Express Co. v. *Byers,* 240 U. S. 612.

Ga., Fla., & Ala. R. Co. v. *Blish Milling Co.,* 241 U. S. 190.

C. N. O. & T. P. R. Co. v. *Rankin,* 241 U. S. 319.

N. Y. C. & H. R. R. R. Co. v. *Beaham,* 242 U. S. 148.

C. & N. W. R. Co. v. *Whitnack Co.,* 258 U. S. 369.

American Ry. Express Co. v. *Lindenburg,* 260 U. S. 584.

American Ry. Express Co. v. *Levee,* 263 U. S. 19.

Davis v. *Cornwell,* 264 U. S. 560.

American Ry. Express Co. v. *Daniel,* 269 U. S. 40.

Galveston Wharf Co. v. *Ry. Co.,* 285 U. S. 127.

Southeastern Exp. Co. v. *Pastime Amusement Co.,* 299 U. S. 28.

Peyton v. *Railway Express Agency,* 316 U. S. 350.

Respondent, by Section 6 (1) of the Interstate Commerce Act, was obliged to publish and file with the Interstate Commerce Commission schedules showing the rates, charges and classifications and "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the * * * shipper."

By Sec. 6 (7) of the same Act it is made unlawful for any common carrier subject to Part 1 of the Act to "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time" or to "extend to any shipper * * * any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

By Sec. 20 (11) of the same Act the carrier was and is bound to issue a receipt.

By Sec. 10 (1) of the same Act it is made a criminal offense for a carrier to wilfully omit or fail to do anything required of it by the Act.

By Sec. 10 (2) and (3) of the same Act it is made a criminal offense for either the carrier to give or a shipper or consignee to receive or obtain, knowingly and wilfully, transportation services at less than the regular rates established and in force.

The rates when filed and published are equally binding upon the shipper and the carrier and both are charged with knowledge of them. *American Railway Express Co.* v. *Daniel*, 269 U. S. 40. As said in *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652:

> "The rate, when made out and filed, is notice, and its effect is not lost, although it was not actually posted

> in the station. * * * The shipper's knowledge of the lawful rate is conclusively presumed."

The limitation clause in the Uniform Express Receipt and the respondent's tariffs provide that in the event of no declaration of value, the carrier's liability is limited to $50.00. Where the value declared is higher than $50.00, the rate charged is correspondingly higher. The shipper, bound to a knowledge of the law and respondent's tariffs, and having failed to instruct her agent to declare a value in excess of $50.00 is bound by the limitation to the same extent as if she personally had delivered the package to respondent and had declared no value. Her agent evidently realized this and told respondent's representative receiving the package to "put on the minimum value which you allow, $50.00" (R. 39). See *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *American Railway Express Co.* v. *Lindenburg*, 260 U. S. 584.

Petitioner knew, or should have known, as a matter of law that respondent would issue a receipt to her agent and that in the absence of any declared value, Clause 2 of the Terms and Conditions of the receipt would limit her recovery for loss of or damage to her shipment to $50.00.

The Supreme Court said in the case of *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652:

> "The valuation declared or agreed upon *as evidenced by the contract of the shipment upon which the published tariff rate is applied*, must be conclusive in an action to recover for loss or damage a greater sum." (Emphasis ours.)

Knowing that petitioner was charged with knowledge of the provisions in Clause 2 of the Terms and Conditions of the Uniform Express Receipt, respondent and petitioner's agent rightfully considered that she wished the package transported with the declared or agreed value of $50.00

which took the minimum rate. *American Railway Express Co.* v. *Daniel,* 269 U. S. 40; *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584, 585, 591, 592.

Petitioner's agent has breached no instruction of the petitioner. To the contrary he has followed her instructions implicitly; and those instructions by implication of law required the transportation at a declared value of $50.00, and at the minimum rate. The receipt when delivered to petitioner's agent constituted the written declaration or agreement from petitioner as to a declared value.

Even if the hotel driver had ben expressly instructed by petitioner to declare a value higher than $50.00, petitioner would be bound by the limitation because she or her husband, certainly her agent for all purposes of the shipment, accepted the receipt and took no exception thereto until after notice of the loss. The carrier is not bound by any private instructions issued to her agent by the shipper. *American Railway Express Co.* v. *Daniel,* 269 U. S. 40; *Great Northern Ry. Co.* v. *O'Connor,* 232 U. S. 508, 514.

IV.

Petitioner Is Estopped from Recovering a Greater Sum Than $50.00.

Broadly stated, the rule is that shipper may not declare a value and obtain the benefit of a lower rate and then after loss repudiate the declaration and recover more than the sum named by him for the purpose of securing the lower rate.

As was said in the case of *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 652, and quoted with approval in the case of *American Railway Express Co.* v. *Lindenburg,* 260 U. S. 584, 592:

"To permit such a declared valuation to be over-

> thrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The Record shows no fraud, no duress, no imposition upon the shipper or her agent by the carrier. She made no effort to change the valuation and evidenced no interest in it until sixteen days after the loss, that is, when she first received knowledge thereof. The carrier was entitled to presume that she would adequately instruct her agent and that in the absence of knowledge on his part she wished to ship at the lowest rate, that is, the one carrying a liability limited to $50.00.

There is certainly no evidence in the case to suggest that the transaction was not knowingly entered into, because, if for no other reason, the law required the shipper to know all that appertained to what was actually done. There is no evidence to suggest that the shipper did not understandingly do what was done, nor could there be any such suggestion, because the law required her to understand that there were different rates based upon valuation. There is nothing to suggest that what was done was not freely done, nor could such a suggestion be made. The shipper had the right under the filed tariffs to name whatever value she desired to name on the shipment, and to pay the rate lawfully affixing thereto. There is no suggestion that the shipper was denied this right.

As said in the case of *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 508-9:

> "That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case.

> The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars, unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the public schedules filed with the Commission."

The value declared is binding regardless of the actual value of the shipment. *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278.

The case of *American Railway Express Co.* v. *Daniel*, 269 U. S. 40 is squarely in point. Petitioner erroneously states that the receipt in the *Daniel* case was delivered to the sender of the goods before the goods were lost and therefore the *Daniel* case is not in point, or at least is not controlling. Actually in the *Daniel* case the court merely said that the receipt "was handed to and bound the sender". Whether it was handed to the sender of the goods before or after the loss does not appear in the *Daniel* case and was not material so long as she or her general agent accepted it. In the instant case the receipt was accepted by petitioner's husband on her behalf fifteen days prior to knowledge of the loss and neither he nor petitioner raised any objection to it. Petitioner further urges that in the *Daniel* case the shipper's agent was expressly authorized to declare a value. If such were the fact, the authorization was for the declaration of a value in excess of $50.00 to which the Supreme Court limited the recovery.

Estoppel stems from good faith. Had the shipment been delivered to the consignee in good order respondent could have collected only those transportation charges predicated on a valuation of $50.00. If petitioner intended to declare the full value of her coat and to pay the transportation charges appertaining thereto, it was her duty to advise respondent as soon as she had knowledge or should

have had knowledge of any declared value different from that which she intended.

Conclusion.

Certiorari should be denied.

Respectfully submitted,

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